IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

In re Personal Restraint Petition of MICHAEL MCKIEARNAN, Petitioner.	NO. 81102-4 REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

I. INTRODUCTION

Rather than defend the Court of Appeals' decision dismissing McKiearnan's *PRP*, the State instead raises a new argument: informing McKiearnan the maximum possible punishment for Robbery in the First Degree could be as little as "20 years" and as much as "life" was correct advice because a court can set the maximum at less than the statutory maximum. In other words, the State argues that a sentencing court has the power to alter the class of crime maximum set in RCW 9A.20.021. The State is incorrect, as McKiearnan demonstrates in this reply.

However, even assuming that the State is correct, McKiearnan was still misinformed. Under the State's analysis the sentencing court could set the maximum at "10 years, or 1 year," or 1 day. *Answer,* p. 3. If that is true, McKiearnan was misinformed when he was told that the court's discretion in setting the maximum

possible punishment could go no lower than 20 years. Under the State's analysis the information given to McKiearnan when he pled guilty was equally incorrect.

Ultimately, the question is whether McKiearnan was given accurate information about a direct consequence of his plea. Both parties seem to agree that the answer is "no."

II. ARGUMENT

The State does not contend that McKiearnan's petition is time barred. The State's apparent concession is well-founded since McKiearnan's *Judgment* contains an obvious error. Instead, the State's focus is on whether McKiearnan was correctly advised of the direct consequences of his plea.

It is well-established that the maximum possible sentence is a "direct" consequence of a guilty plea. *State v. Vensel,* 88 Wn.2d 552, 555, 564 P.2d 326 (1977) ("We believe it is important at the time a plea of guilty is entered, whether in justice or superior court, that the record show on its face the plea was entered voluntarily and intelligently, and affirmatively show the defendant understands the maximum term which may be imposed.").

It is also well-established that misinformation about the maximum sentence renders a plea involuntary. *See In re Hoisington,* 99 Wn. App. 423, 434, 993 P.2d 296 (2000) ("Similarly, the parties in Mr. Hoisington's case believed that second-degree rape was a class B felony, which has a 10-year statutory maximum, and later discovered the charge was a class A felony with a maximum of life."). *See also State v. Mendoza,* 157 Wn.2d 582, 591, 141 P.3d 49 (2006) ("Accordingly, we adhere to our precedent

establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea."). Interestingly, in *Hoisington* the State argued (but, the Court did not decide) the trial court was powerless to set the maximum penalty at anything less than statutorily prescribed—even under a specific performance analysis.

Finally, it is undisputed that, at the time of McKiearnan's plea, life imprisonment was the legislatively declared applicable maximum for first-degree robbery. RCW 9A.56.200; RCW 9A.20.021. The "20 to life" language on McKiearnan's plea form and *Judgment* was an inapplicable pre-SRA vestige.

Nevertheless, the State argues that McKiearnan was given accurate information when he was told that the maximum was "20 years to life." The State's argument is entirely premised on the contention that a court can set the maximum possible penalty at something less than the legislatively determined maximum penalty ("If there had been a finding of substantial and compelling circumstances, the court could have set the petitioner's maximum at 20 years. It could have likewise set it at 30 years, or 10 years, or 1 year."). *Answer,* p. 3.

In support of this argument, the State cites one case: *State v. Oxborrow,* 106 Wn.2d 525, 529-32, 723 P.2d 1123 (1986). However, *Oxborrow* makes no mention of a sentencing court's discretion to lower the maximum possible punishment. Instead, *Oxborrow's* holding is limited to sentences imposed below the "standard range." Thus,

the State's reliance on that case for the proposition that a sentencing court can set the maximum at less than set forth for the class of crime is dubious, at best. Frankly, if the State were correct virtually every plea entered since the adoption of the SRA would be invalid for failing to accurately inform the defendant that the sentencing court has the discretion to impose a sentence less than the maximum designated for the class of crime. In contrast, under McKiearnan's analysis those "standard" plea statements are correct.

Further, setting the maximum at something less than the legislatively-mandated maximum would do violence to concepts like "wash out" (RCW 9.94A.525), and "vacation" (RCW 9.94A.640) which operate on the principle that the maximum for a crime is that set by the Legislature for the class of crime. The State's argument disrupts these concepts—an issue apparently not considered by the State.

Ultimately, the question posed in this case is whether McKiearnan's plea form was correct when it told him the maximum for his crime involved a discretionary judicial decision—one that was legislatively cabined between a low of 20 years and a maximum of life. The question then is what information is required by the court rule governing guilty pleas (CrR 4.2).

This question was best answered recently in *State v. Kennar*, 135 Wn.App. 68, 143 P.3d 326 (2006). In rejecting an argument that an accurate recitation of the class of crime maximum constituted misinformation because *Blakely* defines "maximum" as the standard range maximum, the Court of Appeals held, "CrR 4.2 requires the trial court to inform a defendant of both the applicable standard sentence range and the *maximum sentence for the charged offense as determined by the legislature*. Such was the intent of

the Supreme Court in promulgating CrR 4.2 to effectuate due process when a defendant is considering entering a guilty plea." 135 Wn.App. at 75 (emphasis added). The *Kennar* court based its conclusion in part on the fact that the guilty plea form approved by this Court and contained in CrR 4.2(g) requires that *both* the applicable standard sentence range and the statutory maximum sentence established by the legislature be set forth. "This is a clear indication that the drafters of CrR 4.2 did not believe these to be one and the same." *Id.* at 74. Thus, "a defendant should be informed of both the applicable standard sentence range *and the statutory maximum sentence established by the legislature for the charged offense*." *Id.* at 74 (emphasis added).

Assuming *arguendo* that the State is correct that a sentencing court has the authority to set the individual maximum at less than legislatively specified, the plea form was still inaccurate. If, as the State contends, McKiearnan's sentencing court could set the maximum at 30, 20, 10, of 1 year (or less), McKiearnan was misled when he was told that 20 years was the lowest possible "maximum" that could be set. In other words, under the State's own logic, Petitioner was given misinformation about a direct consequence of his plea.

Nevertheless, the State clings to its argument that Petitioner was given accurate information, admitting only that the language was "awkward." However, there is nothing awkward about "20 to life." The language is clear. Its problem is that it is incorrect.

The State concludes by first acknowledging that Petitioner is not required to establish the materiality of the sentencing consequence to a decision to plead guilty.

Mendoza, supra. The State then makes an emotional appeal that this Court should not permit McKiearnan to withdraw his plea because of potential proof problems the State may face at a new trial.

The law requires more than surmise. *State v. Miller,* 110 Wn.2d 528, 756 P.2d 122 (1988). Because the State has failed to carry its burden (*see State v. Turley,* 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003)), this Court should remand with directions that McKiearnan be permitted to withdraw his plea.

III. CONCLUSION

When he pled guilty, McKiearnan was told that the maximum sentence for First Degree Robbery was "twenty (20) years to life imprisonment." This was a mistake. This mistake was repeated on his *Judgment.* This Court should grant discretionary review.

DATED this 1st day of April, 2008.

Jeffrey E. Ellis, WSBA #17139
Attorney for Mr. McKiearnan

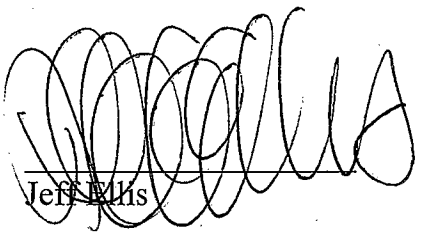
Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (*fax*)
ellis_jeff@hotmail.com

CERTIFICATE OF SERVICE

I, Jeff Ellis certify that on April 1, 2008, I served the party listed below with a copy of the attached *Reply in Support of Discretionary Review* by placing a copy in the mail, postage pre-paid, addressed to:

Seth A. Fine
Deputy Prosecuting Attorney
Snohomish County Prosecutor
3000 Rockefeller Ave., M/S #504
Everett, WA 98201

4/1/08 SEATTLE, WA
Date and Place



Jeff Ellis